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No. 752 47

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

LAWRENCE CALLANAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on February 2, 1960.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra, p. 13) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 2, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) Whether Congress intended that a person be subject to cumulative penalties for a single interference of interstate commerce by extortion and for conspiracy "so to do," under the Hobbs Act, 18 U. S. C. 1951, which statute makes both a conspiratorial and a substantive interference with commerce a crime and provides a twenty year penalty.

(2) Whether the doctrine of res judicata bars a criminal defendant from collaterally attacking an illegal sentence of imprisonment in excess of that authorized by law when on his direct appeal from his conviction he failed to urge a question as to the legality of his sentence.

STATUTE AND RULE INVOLVED.

62 Stat. 793, 18 U. S. C., § 1951, provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the

presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

* * * * * * * *

Rule 35 of the Federal Rules of Criminal Procedure provides:

The court may correct an illegal sentence at any time * * *

STATEMENT.

Petitioner was convicted in the United States District Court for the Eastern District of Missouri on a two count indictment for conspiring to obstruct interstate commerce by extortion and for obstructing interstate commerce by extortion. He was sentenced to imprisonment for a period

of 12 years on each count, the sentences to run consecutively for a total sentence of 24 years. The execution of the 12-year sentence on the second count was suspended and petitioner was placed on probation on this count, with the period of probation to run consecutively with the term of imprisonment imposed on the first count.

Count one charged that from March 1, 1951, until the date of the indictment (March 3, 1954), petitioner and four others did conspire to obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence and fear. Count two charged that on the same dates petitioner and his co-defendants did obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence and fear. The statute alleged to be violated in each count was 18 U. S. C., 1951 (R. 35-44).

The action was tried to the Court and a jury and each defendant was found guilty as charged in the indictment. On June 3, 1955, the judgment was affirmed by the appellate court. **Callanan v. United States**, 8 Cir., 223 F. 2d 171. Pursuant to the judgment of conviction petitioner commenced service of the sentence imposed upon him and is still in custody under this sentence at the United States Federal Prison at Leavenworth, Kansas (R. 7).

On December 17, 1958, petitioner filed a motion for correction of sentence under Rule 35, F. R. Crim. P., or, in the alternative, under 28 U. S. C. 2255 asking that his sentence be corrected on the ground that Congress did not intend that a person be subject to two penalties for obstruction of commerce by extortion and by conspiracy

so to do (R. 2-4).* The facts pertinent to the instant proceedings were stipulated and showed that the indictment involved an interference with a pipe line project (R. 5-7). After a hearing (R. 8-16), the District Court denied the motion (R. 17-32). The Court of Appeals affirmed (Appendix p. 13), holding that the issue could have been raised on direct appeal and, therefore, could not be relitigated. The Court also held that "when an accused is charged with conspiracy to commit a federal offense on one count and then in a second count is charged with the commission of a substantive offense which is the object of the conspiracy, the indictment states two offenses each of which is punishable. **Pinkerton v. United States**, 328 U. S. 640; **United States v. Rabinowich**, 238 U. S. 78 * * *." The Court distinguished **United States v. Universal C. I. T. Corp.**, 344 U. S. 218, **Prince v. United States**, 352 U. S. 322, **Bell v. United States**, 349 U. S. 81, **Ladner v. United States**, 358 U. S. 169, and **Heflin v. United States**, 358 U. S. 415, saying:

> "Thus, in **Universal, Prince, Ladner** and **Bell** cases, no conspiracy was charged in one count and a substantive act which was the object of the conspiracy in another, while in the **Heflin** case, there was no contention that defendant could not get a separate sentence under the conspiracy count. These cases involved either completed attempts or crimes affecting several persons."

The Court rejected petitioner's argument that the wording of the statute and its legislative history were at best

* While the motion asked that the sentence be corrected under Count 1, the rule of the Eighth Circuit is that a court, if a sentence is excessive, may order the sentence under either count vacated even if relief is asked on one count only. Holbrook v. United States, 8 Cir., 136 F. 2d 649. The District Court considered the issue as to whether the sentence on either count should be corrected and concluded that any correction under Count 2 was premature.

equivocal and that under such circumstances the congressional intent being ambiguous the rule of lenity should be applied.

REASONS FOR GRANTING THE WRIT.

1. The Court below assumed that since Congress has the power to punish separately the commission of a substantive offense and a conspiracy to commit the substantive offense[1] that Congress therefore intended that such double punishment may be imposed. In reaching this conclusion the Court misinterpreted the essence of the lenity cases. In all those cases, after it was conceded or decided that Congress had the power to provide for cumulative punishment for offenses arising out of a single factual situation, the question resolved itself to the issue as to whether Congress intended that consecutive punishment might be imposed. While the lenity cases involved substantive crimes, the same problem of Congressional intent is applicable when a single statute proscribes against concerted or individual conduct. The fact that a commission of a substantive offense and a conspiracy to commit it may be separate and distinct crimes and that Congress, if it wishes can provide that such offenses be either punished singly or cumulatively does not mean that Congress when it enacted the instant statute intended that a defendant be punished doubly for both a substantive offense and a conspiracy. We do not here have a case where the conspiracy arises under the general conspiracy statute, 18 U. S. C. 371 and the substantive offense under a separate statute enacted at a different time. Rather, we have a situation where Congress chose to enact a single statute to cover all forms of unlawful interferences with commerce.

The single statute here involved is the Hobbs Act, 18 U. S. C., § 1951, which makes it a crime to unlawfully inter-

[1] Pinkerton v. United States, 328 U. S. 640.

fere with interstate commerce. It is petitioner's position that there can be but a single punishment for a single interference with commerce, whether the acts affecting interstate commerce amount to a conspiracy in restraint of such commerce or not. This is so because Congress did not intend to punish separately the obstruction of commerce by extortion and the conspiracy to so obstruct commerce. Rather the substantive provisions were included to avoid the limitations of the Sherman Anti-Trust Act and to cover all restraints of commerce, whether in the form of conspiracies or not.

An examination of this statute known as the Anti-Racketeering Act in the light of its legislative history suggests the application of the rule of lenity. Originally it was enacted in 1934.[2] It was amended in 1946 by the Hobbs Act.[3] It was modified again in 1948 when the entire criminal code, Title 18, was enacted into positive law.[4] The legislative history as to punishment is meager. But there is nothing to suggest that Congress intended by this single statute multiple punishment for the obstruction of commerce by extortion and for conspiracy so to do.

Section 2 of the 1934 Act made it a crime for any person who in connection with any act affecting commerce "(a) obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money . . ." or "(b) obtains the property of another, with his consent induced by wrongful use of force or fear . . ." or "(c) commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b);" or "(d) conspires or acts concertedly with any other person or persons to commit any

[2] Act of June 18, 1934, c. 569, §§ 1-6, 48 Stat. 979, 980.

[3] Act of July 3, 1946, c. 537, 60 Stat. 420.

[4] Act of June 25, 1948, c. 645, 62 Stat. 793.

of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both" (Appendix p. 23). There was an overlap in each of the subsections. Obtaining property by wrongful use of fear covered by subsection (b) embraces obtaining money by coercion covered by subsection (a). A person who threatens to commit an act of physical injury in furtherance of a purpose under subsection (c) is attempting by the use of force to obtain money under subsection (a). A plan under subsection (c) overlaps the conspiracy under subsection (d). A person who acts concertedly under subsection (d) would also violate the other subsections. It seems more reasonable to conclude that Congress by enacting these subsections meant to cover all types and variety of offender rather than to multiply punishment if a particular violator happened to violate more than a single subsection and that Congress intended, by the wording of the statute, a single punishment for conspiracy and for a violation of this act involving a single interference with commerce.

The purpose of the Anti-Racketeering Act is set forth in the committee report as follows (S. Rep. No. 532, 73d Cong., 2d Session 1-2):

> S. 2248 (H. R. 6926), a bill to protect trade and commerce against interference by violence, threats, coercion, or intimidation. This is a proposed Federal anti-racketeering statute based on the interstate commerce power.
>
> In the past such persons have been prosecuted in the Federal courts for incidental violations of law, such as mail frauds or income-tax evasions. The nearest approach to prosecution of racketeers as such has been under the Sherman Anti-trust Act. This act, however, was designed primarily to prevent and punish capitalistic combinations and monopolies, and because

of the many limitations engrafted upon the act by interpretations of the courts, the act is not well suited for prosecution of persons who commit acts of violence, intimidation, and extortion. Furthermore, the Sherman Act requires proof of a conspiracy, combination, or monopoly, and it is often difficult to prove that the acts of racketeers affecting interstate commerce amount to a conspiracy in restraint of such commerce, or a monopoly. Moreover, a violation of the Sherman Act is merely a misdemeanor, punishable by 1 year in jail plus $5,000 fine, which is not a sufficient penalty for the usual acts of violence and intimidation affecting interstate commerce.

The accompanying proposed statute is designed to avoid many of the embarrassing limitations in the wording and interpretation of the Sherman Act, and to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers. Such restraints if accompanied by extortion, violence, coercion, or intimidation, are made felonies, whether the restraints are in form of conspiracies or not. The proposed statute also makes it a felony to do any act "affecting" or "burdening" such trade or commerce if accompanied by extortion, violence, coercion, or intimidation.

It may be concluded that this Act was initially enacted to cover situations not embraced by the Sherman Act, that its purpose was to provide more severe penalties than provided by that law and that it was designed to cover circumstances where it was difficult to prove conspiracy or combination. There is no indication that Congress intended to punish a single interference doubly if done in combination.

Other legislative history relative to the 1934 Act, is meager. It was passed in the Senate without debate and

without division. In the House the debate was limited to less than a column of the Congressional Record and consisted of one member's demanding and receiving assurance that an exemption for labor was applicable and was satisfactory to organized labor.[5]

The 1946 Act defined commerce, robbery and extortion. Section 2 stated that it was a crime to obstruct commerce by robbery or extortion. Sections 3, 4 and 5 made it a crime "to do anything in violation of Section 2." Section 3 covered those who conspire or act in concert with others, Section 4 included those who attempt or participate in an attempt, and Section 5 embraced those who commit or threat physical violence to any person or property in furtherance of a plan or purpose (Appendix p. 26). Again there is the same overlap in these sections as in the 1934 Act. The most significant change was the elimination of the labor exemption. The purpose of the 1946 amendment was designed to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship.[6] The committee reports and debates relative to the 1946 amendment merely considered the Local 807 case.[7]

The 1948 Act, which is applicable here, substituted the words "attempts or conspires so to do" for the wording of the 1946 Act and omitted as unnecessary the words "participate in an attempt" and the words "or acts in concert with another or with others." See Revisor's note to 18 U. S. C. 1951.

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[5] 78 Cong. Rec. 11402-11403 (1934). See *United States v. Local 807*, 315 U. S. 521.

[6] *United States v. Green*, 350 U. S. 415, 418-419.

[7] H. R. Rep. No. 238, 79 Cong., 1st Sess.; S. Rep. No. 1516, 79 Cong., 2d Sess.; 91 Cong. Rec. 11899-11922 (1945). It was also stated that the definitions of extortion and robbery were modeled after New York Law. 91 Cong. Rec. 11900-11906 (1945); see also *United States v. Nedley*, 2 Cir., 255 F. 2d 350.

The fact that the government is seeking to uphold multiple punishment under a single statute rather than under several statutes is of significance as indicating an attitude of lenity on the part of Congress. See **Gore v. United States**, 357 U. S. 386, 391. The heavy penalty provision of twenty years is another factor indicating that Congress did not intend to pyramid penalties. At least the congressional intent as to cumulative punishment is ambiguous and therefore the policy of lenity should be applicable. **Bell v. United States**, 349 U. S. 81, 83-84; **Ladner v. United States**, 358 U. S. 169; **Heflin v. United States**, 358 U. S. 415.

It is clear that the court below has decided an important federal question in a way in conflict with the applicable decisions of this Court. Instead of seeking to ascertain the intent of Congress, the appellate court erroneously equated power with intent.

2. The Court below held: "Appellant's motion whether based upon Rule 35 or Section 2255, supra, cannot serve as an appeal. The questions now sought to be litigated could have been urged by him on appeal from his conviction and hence he cannot collaterally attack the judgment of conviction and sentence by motion." The Court ignored the fact that Rule 35 provides that "the Court may correct an illegal sentence at any time." Moreover, this holding conflicts with the decision of this Court in **Heflin v. United States**, 358 U. S. 415, 417-418, which, as the petitioner argued below, impliedly finds the doctrine of res judicata inapplicable. Indeed in that case this Court even said that "successive motions may be made under Rule 35." This Court in other instances has reached and decided issues concerning the legality of the length of a sentence, although the questions were raised by collateral attack on consecutive sentences. **Prince v. United States**, 352 U. S. 322; **Gore v. United States**, 357 U. S. 386. In

Heflin, the defendant had taken a direct appeal as did petitioner in this case. 223 F. 2d 371. In **Prince** and **Gore**, the defendants had been tried and convicted but did not institute a direct appeal. We see, however, no distinction between a defendant who appeals and one who does not directly appeal his conviction. Both could have litigated any question concerning the length of their sentence on direct appeal. One reason why defendants in both categories may litigate that issue on collateral attack is that such a sentence may be corrected "at any time." It would be unjust to imprison any individual beyond the length of time that Congress had designated as the maximum period for a certain type of wrongful conduct.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF COURT OF APPEALS.

United States Court of Appeals
For the Eighth Circuit.

No. 16,293

Lawrence Callanan, Appellant, v. United States of America, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

[February 2, 1960.]

Before Gardner, Woodrough, and Vogel, Circuit Judges.

Gardner, Circuit Judge.

This is an appeal from an order of the trial court overruling appellant's motion under Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, or in the alternative, under Section 2255, Title 28, United States Code, to correct the sentences imposed on him on July 19, 1954.

On March 3, 1954, the defendant and four others were charged in a two count Indictment. Count One charged that from March 1, 1951, until the date of Indictment, de-

fendants did conspire to obstruct, delay, and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden, individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence, and fear. Count Two charged that on the same dates defendants did obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden, individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence, and fear, in violation of Section 1951, Title 18, United States Code.

The action was tried to the court and a jury and each defendant was found guilty as charged in the Indictment. Appellant, one of the defendants, was thereupon sentenced to a term of imprisonment for a period of twelve years on Count One and twelve years on Count Two of the Indictment. The term of imprisonment on Count Two was made to run consecutively with the term of imprisonment on Count One, but execution of sentence on Count Two was suspended and appellant was placed on probation on Count Two for a period of five years and this term of probation was made to run consecutively with the term of imprisonment imposed on Count One. On appeal the judgment was affirmed. **Callanan et al. v. United States**, 8 Cir., 223 F. 2d 171. Pursuant to the judgment of conviction appellant commenced service of the sentences imposed upon him and is still in custody under this sentence at the United States Federal Prison at Leavenworth, Kansas. The facts pertinent to the instant proceeding were stipulated and hence are not in dispute. They are substantially as follows:

Defendants were labor union representatives; Callanan for the pipefitters, Bianchi for the operating engineers, Thompson for the teamsters, Poster and Secor for the

laborers. On a 1951 pipe line construction project, the O. R. Burden Construction Company, which employed the crafts represented by the defendants, encountered numerous difficulties. The welders were working only four hours a day for a full day's pay, more men were put on the job than were necessary, and labor costs were higher than for similar work in other comparable regions. In May, 1952, when the Burden Company was getting ready to start upon another project involving the construction of a new pipe line and the taking up of an old pipe line in Missouri and Illinois, a pre-job meeting was held with the defendants as representatives of the craft unions. Mr. Burden testified that, at the request of appellant, he had lunch with appellant alone; that at the luncheon, he told appellant about his difficulties and said that something drastic would have to be done if his company was to complete its project without great loss. He further testified that appellant had asked him how much money there was on the job and whether there would be one cent a foot on the project, a rate which would total $28,000.00 or $29,000.00 on the whole job; that appellant told him that the other crafts would share in the division but that the welders would get the greater share because they had not interfered with the construction company as had the other crafts and that he would talk to the other crafts. Burden told appellant that no payment would be made until a substantial portion of the work was done and it was agreed that payments to the defendants would be made by false invoices. Burden also testified that, after the project had been started, at a private meeting with appellant in August, 1952, he complained that defendants were not living up to the agreement, and that appellant assured him that the work would pick up and that he would talk to the other crafts. The Burden Company paid $28,000.00 on invoices from various companies or individuals. Thompson, Poster, and Secor were shown to have received money from

the Washington Equipment & Construction Company which submitted bills to Burden. There was testimony that a friend of appellant set up a fictitious company which sent invoices to the Burden Company. One Sariego testified that appellant called Baleh, an international union organizer, and told him to set up a fictitious company, the Pipe Line Welders Supply Company. Pipe Line Welders Supply Company invoices in the amount of $1,606.40 and $1,616.24 were sent to the Burden Company. Burden Corporation checks dated October 14 and October 30, 1952, each in the amount of $3,791.04, were sent to a mailing address in payment of these invoices. The court in its instructions allowed the jury to return a verdict for both counts of the Indictment.

In his motion, appellant seeks to correct the sentence imposed on Count One of the Indictment on the theory that in fact but one offense was charged or embodied in the two counts of the Indictment and hence the sentences imposed exceeded the maximum penalty of twenty years fixed by the statute, Section 1951, Title 18, United States Code

In seeking reversal of the order denying his motion, appellant contends that the court erred in overruling his motion to correct the sentence imposed on him on July 19, 1954 because: (1) Congress, in enacting the Hobbs Act, Section 1951, Title 18, United States Code, did not intend that a person be subject to cumulative penalties for the obstruction of commerce by extortion and conspiracy so to do; (2) the sentence under Count One should be corrected; (3) the remedy under Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, or in the alternative under Section 2255, Title 28, United States Code, is the correct remedy; and (4) appellant is not barred by res judicata from seeking to correct an illegal sentence.

It is the contention of appellant that Count One, which charges a conspiracy to obstruct and delay interstate commerce by extortion, and Count Two, which charges actually obstructing and delaying interstate commerce by extortion, constitute but one offense, the maximum penalty for which, fixed by the so-called Hobbs Act, was twenty years. The question presented is whether the Indictment, though containing two counts, in fact stated but one offense.

When an accused is charged with conspiracy to commit a federal offense in one count and then in a second count is charged with the commission of the substantive offense which is the object of the conspiracy, the Indictment states two offenses, each of which is punishable. **Pinkerton v. United States**, 328 U. S. 640; **United States v. Rabinowich**, 238 U. S. 78; **Scott v. United States**, 10 Cir., 115 F. 2d 137; **Hulahan v. United States**, 8 Cir., 214 F. 2d 441; **Chew v. United States**, 8 Cir., 9 F. 2d 348; **Brown v. United States**, 8 Cir., 167 F. 2d 772. Answering an argument that a count in an indictment charging a conspiracy to commit an offense and a separate count charging the commission of the offense constituted but one offense, the Supreme Court in **Pinkerton v. United States**, supra, said, inter alia:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. * * * The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has long been consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

In **Brown v. United States**, supra, it was contended, as in this case, that a count in the indictment charging a conspiracy to commit an offense and a separate count charging commission of the offense charged but one offense.

punishable as such. In the course of the opinion, referring to this contention, we said:

> "Except in some very limited types of situations (none of which is here involved), the commission of a substantive offense and a conspiracy to commit it are distinct crimes and may be separately charged and punished. **Pinkerton v. United States,** 328 U. S. 640, 643, 644, 66 S. Ct. 1180, 1182, 90 L. Ed. 1489; **American Tobacco Co. v. United States,** 328 U. S. 781, 787-789, 66 S. Ct. 1125, 1128, 1129, 90 L. Ed. 1575. And the substantive offense may be charged and punished as a distinct crime, even though the conspiracy charge also sets out the facts involved in the substantive offense as an overt act of the conspiracy. **United States v. Bayer,** 331 U. S. 532, 542, 543, 67 S. Ct. 1394, 1399, 91 L. Ed. 1654."

The same principle is announced in **Scott v. United States,** supra, as follows:

> "Although the indictment was not attacked in the trial court by demurrer or motion to quash, the contention is advanced here that it was fatally defective in that appellant and five others were charged in one count with the crime of conspiracy to commit perjury, and appellant alone was charged in the other count with the substantive offense of perjury. It is urged that this constitutes an improper joinder of charges. It is well settled that a conspiracy to commit a crime and the substantive crime of which the conspiracy is the object may be laid as separate counts in a single indictment, and that sentence may be imposed upon each count."

Appellant relies strongly on **United States v. Universal C. I. T. Corp.,** 344 U. S. 218; **Prince v. United States,** 352 U. S. 322; **Bell v. United States,** 349 U. S. 81; **Ladner v.**

United States, 358 U. S. 169; and **Heflin v. United States**, 358 U. S. 415, in which the Court held that there was only one offense and one sentence permissible, under the rule of lenity. The cases are readily distinguishable. Thus, in the **Universal**, **Prince**, **Ladner**, and **Bell** cases, no conspiracy was charged in one count and a substantive act which was the object of the conspiracy in another, while in the **Heflin** case, there was no contention that defendant could not get a separate sentence under the conspiracy count. These cases involved either completed attempts or crimes affecting several persons.

We conclude that the sentences involved were not illegal sentences and Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, authorizing the correction only of an "illegal sentence", cannot be invoked.

As to the rights of appellants as determined by Section 2255, Title 28, United States Code, it is noted that this section refers to a chain of "right to be released." It is to be noted that appellant does not claim the right to be released. He admits that he has served only four years of a sentence which he claims should be fixed at eight years. He is, therefore, not entitled to any relief under Section 2255, supra.

Appellant's motion, whether based upon Rule 35 or Section 2255, supra, cannot serve as an appeal. The questions now sought to be litigated could have been urged by him on appeal from his conviction and hence he cannot collaterally attack the judgment of conviction and sentence by motion. **Taylor v. United States**, 8 Cir., 229 F. 2d 826; **Shobe v. United States**, 8 Cir., 220 F. 2d 928; **Burns v. United States**, 8 Cir., 229 F. 2d 87; **Kaplan v. United States**, 8 Cir., 234 F. 2d 345; **Hickman v. United States**, 8 Cir., 246 F. 2d 178. In the instant case there was an appeal and the judgment was affirmed. **Callanan et al. v. United States**,

8 Cir., 223 F. 2d 171. That affirmance covered not only the questions actually raised but also the questions that might have been raised. **Lipscomb v. United States**, 8 Cir., 226 F. 2d 812; **Mitchell v. Village Creek Drainage Dist.**, 8 Cir., 158 F. 2d 475. What is said by us in **Lipscomb v. United States**, supra, is here apposite. In the course of the decision in that case we, among other things, said:

"* * * the contentions now presented could have been urged in that proceeding as there is no claim that they arose subsequent thereto and the decision in that proceeding is binding on the defendant not only as to the contentions there made but as to all other contentions which could have been made.

"In the course of our opinion in **Mitchell v. Village Creek Drainage Dist.**, 8 Cir., 158 F. 2d 475, 477, it is said:

" 'It is elementary that res judicata may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding but also as to any other available matter which might have been presented to that end. **Stevens v. Shull**, 179 Ark. 766, 19 S. W. 2d 1018, 64 A. L. R. 1258; **Chicot County Drainage Dist. v. Baxter State Bank**, 308 U. S. 371, 64 S. Ct. 317, 84 L. Ed. 329; **Jackson v. Irving Trust Co.**, 311 U. S. 494, 61 S. Ct. 326, 85 L. Ed. 297; **Billings Utility Co. v. Advisory Committee Board of Governors**, 8 Cir., 135 F. 2d 108; **Kithcart v. Metropolitan Life Ins. Co.**, 8 Cir., 119 F. 2d 497; **McIntosh v. Wiggins**, 8 Cir., 123 F. 2d 316; **Howard v. Chicago, B. & Q. R. Co.**, 8 Cir., 146 F. 2d 316. The rule is succinctly stated in 30 American Jurisprudence, Sec. 179, at page 923, as follows:

" ' "The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application that a deter-

mination of the questions involved in the prior action; the conclusiveness of the judgment in each case extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. This rule applies to every queston falling within the purview of the original action, in respect to matters of both claim and defense, which could have been presented by the exercise of due diligence."

"We have specifically held that the doctrine of res judicata is applicable to a proceeding under Title 28, U. S. C., § 2255."

We are of the view that the present proceeding cannot now be maintained but is barred under the doctrine of res judicata.

Being of the view that, for the foregoing reasons, the order appealed from must be affirmed, further discussions of appellant's contentions would unduly extend this opinion and serve no useful purpose. The order appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(JUDGMENT.)

United States Court of Appeals
for the
Eighth Circuit.

No. 16293 - - - September Term, 1959.

Lawrence Callanan, Appellant.

vs.

United States of America.

Appeal from the United States District Court
for the Eastern District of Missouri.

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

February 2, 1960.

Act of June 18, 1934, 48 Stat. 979.

AN ACT.

To protect trade and commerce against interference by violence, threats, coercion, or intimidation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the term "trade or commerce", as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia,

in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations or the purchase or rental of property or protective services not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

Sec. 3. (a) As used in this Act the term "wrongful" means in violation of the criminal laws of the United States of any State or Territory.

(b) The terms "property", "money", or "valuable considerations" used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee.

Sec. 4. Prosecutions under this Act shall be commenced only upon the express direction of the Attorney General of the United States.

Sec. 5. If any provisions of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Sec. 6. Any person charged with violating this Act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: **Provided**, That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

Act of July 3, 1946, 60 Stat. 420.

AN ACT.

To amend the Act entitled "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation," approved June 18, 1934.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to protect trade and commerce against the interference by violence, threats, coercion, or intimidation", approved June 18, 1934 (48 Stat. 979; U. S. C., 1940 edition, title 18, secs. 420a-420e), be, and it is hereby amended to read as follows:

TITLE I.

Sec. 1. As used in this title—

(a) The term "commerce" means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States has jurisdiction; and the term "Territory" means any Territory or possession of the United States.

(b) The term "robbery" means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

(c) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

SEC. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both.

TITLE II.

Nothing in this Act shall be construed to repeal, modify, or affect either section 6 or section 20 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914, or an Act entitled "An Act to amend the judicial code and to define and limit the jurisdiction of the courts in equity, and for other purposes", approved March 23, 1932, or an Act entitled "An Act to provide for the prompt disposition of disputes between carriers and their employees, and for other purposes", approved May 20, 1926, as amended, or an Act entitled "An Act to diminish the causes of labor disputes burdening or obstructing interstate or foreign commerce, to create a National Labor Relations Board, and for other purposes", approved July 5, 1935.